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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RAUL OTERO CAZARES,

Defendant and Appellant.

E065250

(Super.Ct.No. RIF1403662)

OPINION

APPEAL from the Superior Court of Riverside County. Charles J. Koosed, Judge.

Affirmed.

Raul Otero Cazares, in pro. per.; John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance by Plaintiff and Respondent.

I

INTRODUCTION

Defendant Raul Otero Cazares appeals from judgment entered following a jury conviction for raping a 68-year-old woman (Doe), with whom he had previously had an

intimate relationship which had ended years before. Up until the time of the rape, the victim had permitted defendant to continue living on her property. The trial court sentenced defendant to six years in prison.

After defendant filed a notice of appeal, this court appointed counsel to represent him. Defense counsel filed a brief under *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, setting forth a statement of the case and facts, and identifying the following two potentially arguable issues for this court's independent review. Those issues include: (1) whether the trial court erred by excluding evidence of a 1999 sex tape between defendant and Doe; and (2) whether the trial court erred by admitting evidence of an incident in which defendant threatened Doe with a firearm two weeks before the charged rape offense.

Defendant requests this court to conduct an independent review of the record. Defendant has filed a supplemental letter brief in propria persona. We have reviewed defendant's supplemental letter brief. Under *People v. Kelly* (2006) 40 Cal.4th 106, we have also independently reviewed the record for potential error and find no arguable issues. We therefore affirm the judgment.

II

STATEMENT OF FACTS

Doe met defendant in 1998 at work. Doe and defendant first had sex together in 1999. From 2001 to 2002, Doe rented a room from defendant. During that time, Doe and defendant continued to have sex with each other. In 2002, Doe moved to an apartment with her mother, and then to a house Doe bought in 2003. Defendant and Doe

continued their sexual relationship. Defendant moved in to Doe's home around 2005, after he was fired from his job.

Defendant and Doe stopped having sex with each other in 2006, because of defendant's verbal abuse. Defendant, however, continued living in Doe's home, during which he was verbally and physically abusive to Doe. The abuse got worse after Doe's mother moved out in 2007. Defendant did not pay rent but did yardwork and home repairs for Doe, and contributed to groceries when able to do so.

Doe testified that from 2007 to 2014, her relationship with defendant was contentious and he was abusive to her on numerous occasions. On one occasion, defendant attempted to choke her. On another occasion, defendant told Doe he was never going to leave her home and, if she tried to force him to leave, he would burn it down. Doe told him if he did, he would go to jail. Defendant said when he got out, he would find her and put her in the hospital permanently. Doe testified that she was "really scared" of defendant. The next morning defendant agreed to move to Doe's guest house.

Defendant continued to live on Doe's property but Doe did not have sex with him from 2007 to 2014. Two weeks before the charged crime, defendant returned from a three-week trip. Doe had put on the table defendant's gun, which defendant had let Doe borrow for protection in his absence. Defendant became angry because Doe turned on the television while he was talking on the phone. Defendant hit the remote out of Doe's hand and broke it. Then he picked up the gun on the table and said to Doe, "I ought to put a bullet in your head right now." Defendant's other hand was on the ammunition clip.

Doe froze. While watching defendant, she calculated that she had enough time to run out the front door before defendant loaded the gun. With his right hand, defendant pointed his index finger at Doe, imitating a gun. Defendant then picked up his belongings and walked out. Doe went to the courthouse and picked up restraining order forms. She did not fill out and file the restraining order application that day.

On the day of the rape incident, at Doe's request, defendant removed his computer and other belongings from Doe's house and placed them in Doe's guest house where defendant was living. Doe intended to change the locks on her house to prevent defendant from having free access to her home. Defendant was angry about having to move his belongings into the guest house.

That same day, defendant entered Doe's kitchen to give Doe a \$100 check for a vehicle he was purchasing from Doe. Doe took the check. Doe testified that when she went to her bedroom to put it on her dresser, defendant followed her to her bedroom and, without saying anything, pushed Doe onto her bed on her back. Doe said, "what are you doing?" Defendant fell on top of Doe on her bed. Doe said, "get off of me" and tried to hit him. She again said "get off of me" and "[d]on't do this." Defendant said, "[Y]ou've taken everything from me. Now I'm going to get something for myself." Doe testified defendant took off Doe's clothes, including her pants, underpants, shirt and bra. Doe tried but was unable to get out from underneath him. Defendant then put his penis in Doe's vagina while Doe was trying to hit him and was telling him not to do it. Defendant ignored Doe's pleas.

Doe testified she eventually gave up fighting defendant because it was not doing any good and she feared defendant would hurt her. She was afraid of defendant because of his threats made earlier that month. After defendant ejaculated, he put his pants back on and said to Doe, “[T]his is better than what a tramp like you deserves.” Doe told him to get out, and he left.

Doe immediately put her clothes on, grabbed her restraining order papers she had filled out, and went to the courthouse to file them. Doe left as quickly as possible because she feared defendant would return and shoot her. When she submitted her restraining order papers to the court clerk, she started crying. The clerk asked her what was wrong. Doe told her she had just been raped. A police officer immediately came over and asked her to come with him. Doe then went to the hospital for a sexual assault response team (SART) exam. The exam showed Doe suffered abrasions and bleeding to her external genitalia and a bruise to her right buttock.

That same day, Detective Brazil set up a pretext call for Doe to call defendant regarding the rape incident. During two recorded pretext calls, defendant denied raping Doe. He complained about being forced to leave Doe’s home and not having any money. In response to Doe accusing him of raping her, he said, “[Y]ou’re not 16 anymore. And it’s not like you didn’t have sex with me in the past. You didn’t incur any damages. Not traumatized by it. I don’t know what you want. You took from me. I’m taking from you. It’s as simple as that.” Doe denied taking anything from him.

During the recorded call, Doe asked defendant why he raped her. Defendant responded, “You weren’t f----n’ raped. It wasn’t like a f----n’ stranger on the street. It

wasn't like in a dark alley. And it wasn't like you're in some f----n' . . . convent all over again. Where you're reinventing your . . . virginity." Defendant added, "Yeah you said, 'No.' I didn't see f-----g tooth-and-nail, or screaming your head off, okay?" Doe responded, "I was trying to. I was pushing you. I was hitting you." In response, defendant said, "Oh yeah. I – I have scratches. [¶] . . . [¶] . . . I have bite marks."

Later during the recorded conversation, defendant declared, "Call it payback, I guess. You push – you kick a dog enough f----n' times, it's gonna bite you." A little later, defendant said, "[y]ou're not f-----g raped. You know, it's not like I'm a cluck off the f----n' street or some . . . ninja-style dressed (unintelligible) creeping into your bedroom. You've known me for how many f-----g years?" Doe said they had not had sex for almost eight years. Defendant replied, "tough shit."

Defendant testified at trial that he did not rape Doe. He claimed they had consensual sex. Doe asked him to come inside the house because she wanted to show him something. She led him to her bedroom, put her hands on his cheeks, and kissed him. Doe undressed herself, and defendant took off his boots, socks, and jeans. Defendant asked for oral sex. Doe said no. Defendant helped Doe take off her shirt and then they had sex for five or 10 minutes.

III

EXCLUSION OF THE SEX TAPE

We find no merit to the contention the trial court abused its discretion in excluding the 1999 sex tape involving defendant and Doe (sex tape). Defendant requested in his

trial brief that the 1999 sex tape be admitted into evidence. The prosecution objected on the grounds the sex tape was irrelevant and unduly prejudicial.

Under Evidence Code section 1103, subdivision (a), evidence of the character or a trait of character of the victim of the crime for which the defendant is being prosecuted is not inadmissible under Evidence Code section 1101 if the evidence is offered by the defendant to prove the victim's conduct in conformity with the character or character trait. (Evid. Code, § 1103, subd. (a).) However, under subdivision (c)(1) of Evidence Code section 1103, in a rape prosecution (§ 261), "evidence of specific instances of the complaining witness' sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the complaining witness." (Evid. Code, § 1103, subd. (3)(1).)

During the pretrial court hearing on the parties' motions in limine, the court acknowledged it was undisputed defendant and Doe had an intimate sexual relationship years before the charged offense. Subdivision (c)(3) of Evidence Code section 1103 provides that the exclusion of evidence under Evidence Code section 1103, subdivision (c)(1), is inapplicable to evidence of the victim's sexual conduct with the defendant. Therefore the parties could present evidence regarding defendant and Doe's sexual relationship with each other.

Defendant argued that the 1999 sex tape was admissible as evidence to show that Doe consented to have sex with him when he had sex with her 15 years later, on September 17, 2014, when Doe was 68 years old and defendant was 51. The prosecution argued the sex tape should be excluded as irrelevant and unduly prejudicial. The trial

court agreed and ordered the sex tape evidence excluded unless during the trial, it became admissible as impeachment evidence.

Evidence Code section 352 provides: “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” “A trial court is vested with wide discretion in deciding the relevancy of evidence. [Citations.] Further, it is the exclusive province of the trial court to determine whether the probative value of evidence outweighs its possible prejudicial effect. [Citation.] On appeal, the court’s exercise of such discretion will not be disturbed absent a clear showing of abuse. [Citations.]” (*People v. Sassounian* (1986) 182 Cal.App.3d 361, 402.)

The trial court did not abuse its discretion in excluding the sex tape. Doe met defendant in 1998. According to the prosecutor, the sex tape was created in 1999, 15 years before the charged rape. There is no dispute that before the charged crime in September 2014, defendant and the victim had a consensual sexual relationship. But according to Doe, she stopped having consensual sex with defendant in in 2006, because of defendant’s verbal abuse. Doe nevertheless permitted defendant to continue living in her home up until the time of the charged offense in September 2014.

The trial judge stated during the hearing on admissibility of the sex tape that he watched the sex tape and it did not reveal anything relevant to the charged crime. The sex tape showed defendant and Doe having consensual sex. Although at one point in the video Doe said, “No,” and then proceeded with intercourse with defendant, this did not

show the victim was ambiguous or inconsistent in expressing her desires to reject or consent to defendant's sexual overtures. The trial court explained that the sex tape, when viewed as a whole, showed that Doe was not protesting having sex with defendant. Rather, she appeared to be objecting to defendant putting the camcorder in her face while having sex.

The sex tape evidence is far more prejudicial than probative. It does not have any bearing on whether Doe consented to sex at the time of the charged offense. The charged offense occurred at least 15 years after defendant made the sex tape, and about eight years after defendant's sexual relationship with Doe had ended. The trial court therefore appropriately excluded the tape under Evidence Code section 352. The evidence was irrelevant, highly prejudicial, and potentially confusing for the jury. There was no error in excluding it.

IV

EVIDENCE OF A PRIOR UNCHARGED CRIME

No reasonable argument can be made that the trial court abused its discretion in allowing evidence of an uncharged gun offense, which defendant committed two weeks before the charged rape.

Defendant requested in his trial brief that the trial court exclude evidence regarding an incident in which Doe claimed that two weeks before the charged rape, defendant took his gun off the dining room table and, while holding the gun, said to Doe, "I should just put a bullet in your head." Defendant denied in his trial brief that he made such a statement. Defendant further argued that evidence of the incident should be

excluded under Evidence Code section 352 as unduly prejudicial and irrelevant to the issue of whether Doe consented to sex two weeks later.

During the hearing on defendant's motion in limine to exclude the gun incident evidence, the prosecutor argued evidence of the gun incident was highly relevant to Doe's state of mind, of reasonable fear two weeks later, during the rape offense. The evidence explained why Doe did not vigorously fight back during the rape. Although there was evidence Doe resisted, defendant claimed Doe passively submitted to having sex with him. The prosecutor argued the gun incident evidence was relevant to show Doe did not resist defendant more forcefully because she feared he would harm her. The trial court agreed to allow the evidence on the ground the evidence was highly relevant to Doe's state of mind and behavior. The court concluded the probativeness of the evidence outweighed any prejudicial impact.

Evidence that defendant committed an uncharged prior crime “is admissible when it is logically, naturally, and by reasonable inference relevant to prove some fact at issue, such as motive, intent, preparation or identity. [Citations.] The trial court judge has the discretion to admit such evidence after weighing the probative value against the prejudicial effect. [Citation.] When reviewing the admission of evidence of other offenses, a court must consider: (1) the materiality of the fact to be proved or disproved, (2) the probative value of the other crime evidence to prove or disprove the fact, and (3) the existence of any rule or policy requiring exclusion even if the evidence is relevant. [Citation.] . . .’ [Citation.] “We review for abuse of discretion a trial court’s rulings on

relevance and admission or exclusion of evidence under Evidence Code sections 1101 and 352.””” (*People v. Fuiava* (2012) 53 Cal.4th 622, 667-668.)

The gun incident evidence was highly relevant to establishing defendant’s relationship with Doe at the time of the charged crime. The evidence showed that defendant was hostile and abusive toward Doe shortly before the charged crime. The evidence thus had substantial bearing on the key issue of whether Doe consented to sex at the time of the charged offense of rape. The trial court therefore did not abuse its discretion in allowing evidence of the gun incident upon finding the evidence was highly probative and its value outweighed any prejudicial impact.

V

DISPOSITION

The judgment is affirmed.

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CODRINGTON

J.

We concur:

RAMIREZ

P. J.

MILLER

J.